Supreme Court, U. S.
FILED
JUL 23 1980
MICHAEL RODAK, JR., CLERK

No. 80-99

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; THE SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA,

Petitioners,

vs.

DONNY BRURELL BUCKLEY AND ALYCIA MARQUESE BUCKLEY, BY THEIR PARENT AND NEXT FRIEND, RUBY L. BUCKLEY, ON BEHALF OF THEMSELVES AND ALL NEGRO SCHOOL AGE CHILDREN RESIDING IN THE AREA SERVED BY THE ORIGINAL DEFENDANTS; UNITED STATES OF AMERICA; THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review are:

1. Whether the location of public housing projects can form the basis for an interdistrict school desegregation remedy.

2. Whether State legislation which reorganized county civil government should have expanded the boundaries of

one segregated school district and eliminated all other nonsegregated school districts in the county.[1]

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1. A listing of all parties in the United States Court of Appeals for the Seventh Circuit, whose judgment is sought to be reviewed, is as follows: The Metropolitan School District of Decatur Township, Marion County, Indiana; The Franklin Township Community School Corporation, Marion County, Indiana; The Metropolitan School District of Lawrence Township, Marion County, Indiana; The Metropolitan School District of Perry Township, Marion County, Indiana; The Metropolitan School District of Pike Township, Marion County, Indiana; The Metropolitan School District of Warren Township, Marion County, Indiana; The Metropolitan School District of Washington Township, Marion County, Indiana; The Metropolitan School District of Wayne Township, Marion County, Indiana; School City of Beech Grove, Marion County, Indiana; School Town of Speedway, Marion County, Indiana; The Housing Authority of the City of Indianapolis, Indiana; The Metropolitan Development Commission of Marion County, Indiana; Otis R. Bowen, as Governor of the State of Indiana; Theodore L. Sendak, as Attorney General of the State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; The Indiana State Board of Education, a public corporate body; The Indiana State Teachers Association; Donny Brurell Buckley and Alycia Marquese Buckley, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by the original defendants herein; United States of America; and The Board of School Commissioners of the City of Indianapolis, Indiana.

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OPINIONS BELOW.

The opinions delivered in the court below are, in chronological order, as follows:

Opinion of the United States District Court for the Southern District of Indiana ("District Court"), dated August 1, 1975. (419 F. Supp. 180) (SA 36)[2]

Majority and dissenting opinions of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals"), dated July 16, 1976, affirming the District Court, which were appealed to this Court or subject to petitions for certiorari and were remanded by this Court, 429 U. S. 1068 (1977). (541 F. 2d 1211) (SA 1)

Principal, concurring and dissenting opinions of the Court of Appeals, dated February 14, 1978, remanding the case to the District Court. (573 F. 2d 400) (JA 54)

Opinion of the District Court on remand, dated July 11, 1978 (456 F. Supp. 183) (JA 84)

Opinion of the District Court on additional limited remand related to remedy, dated April 24, 1979, as yet unreported. (JA 101).

Majority and dissenting opinions of the Court of Appeals, dated April 29, 1980, as yet unreported, which are the subject of this appeal. (JA 1)

JURISDICTION.

The judgment and opinion of the Court of Appeals sought to be reviewed by this petition were dated and entered April 29, 1980. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

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2. Petitioners hereby adopt the separately bound Joint Appendix, previously filed in this Court with petitions for certiorari by The Metropolitan School District of Perry Township, Marion County, Indiana, and Otis R. Bowen, Governor of Indiana, and other State officials, and the separately bound Supplemental Appendix filed with the petition for certiorari filed by The Metropolitan School Districts of Lawrence, Warren and Wayne Townships, Marion County, Indiana, et al. Those appendices will be cited as "JA" and "SA", respectively.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, which provides:

> "Section 1. * * * No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. CONST. amend. XIV.

Indiana statutes involved in the Court of Appeals holding that failure to expand the boundaries of the Indianapolis Public Schools in 1969 was a constitutional violation warranting an interdistrict school desegregation remedy are: Indiana Acts 1961, Ch. 186 (Marion County School Annexation Act) (JA 138); Indiana Acts 1969, Ch. 52 (School Annexation Amendment) (JA 151); and Indiana Acts 1969, Ch. 173 (Marion County Civil Government Reorganization Act, often referred to as "Uni-Gov") (JA 154).

Indiana statutes showing existing legislative policy relating to school and civil boundaries are: Indiana Acts 1959, Ch. 202, as amended by Indiana Acts 1961, Chs. 231 and 302 (School Corporation Reorganization Act) (SA 63); Indiana Acts 1961, Ch. 186 (Marion County School Annexation Act) (JA 138). The statutes indicating impediments to civil boundary change prior to and after 1969 are: Indiana Acts 1905, Ch. 129, as amended by Indiana Acts 1955, Ch. 269 (SA 55); and Indiana Acts 1969, Ch. 239 (SA 47).

Statutes involved in the Court of Appeals holding that the location of all public housing projects within the area served by the Indianapolis Public Schools was a constitutional violation warranting an interdistrict school desegregation remedy are: Indiana Acts 1937, Ch. 207, pp. 1034-1055 (Housing Authority Act), as amended by Indiana Acts 1965, Ch. 384, pp. 1185-1192 (JA 168); Indiana Acts 1937, Ch. 209, pp. 1058-1063

(Housing Cooperation Act) (JA 168); and the United States Housing Act of 1937, as amended, 42 U. S. C. § 1415 (JA 169).

The statutes cited above are set out in pertinent part in the Joint Appendix or the Supplemental Appendix at the pages indicated.

STATEMENT OF THE CASE.

Petitioners The School Town of Speedway, Indiana, and The School City of Beech Grove, Indiana, are school corporations created and existing under Indiana law. They own and operate school systems which serve respectively, the civil Town of Speedway and the civil City of Beech Grove, Indiana, two municipalities located adjacent to the City of Indianapolis, Indiana. The municipalities of Speedway, Beech Grove and Indianapolis are all located in Marion County, Indiana. In 1970 the City of Beech Grove had a population of 13,559 and the Town of Speedway had a population of 15,056.

All public schools within Marion County are owned and operated by a total of eleven independent school corporations, including petitioners. Of these, eight are township school systems.[3] The Indianapolis Public School System (IPS) is located entirely within the former boundaries of the city of Indianapolis. The boundaries of The School Town of Speedway and The School City of Beech Grove are coterminous respectively

3. The eight township school systems in Marion County are: The Metropolitan School District of Decatur Township, Marion County, Indiana; The Franklin Township Community School Corporation, Marion County, Indiana; The Metropolitan School District of Lawrence Township, Marion County, Indiana; The Metropolitan School District of Perry Township, Marion County, Indiana; The Metropolitan School District of Pike Township, Marion County, Indiana; The Metropolitan School District of Warren Township, Marion County, Indiana; The Metropolitan School District of Washington Township, Marion County, Indiana; and The Metropolitan School District of Wayne Township, Marion County, Indiana.

with the civil Town of Speedway and the civil City of Beech Grove.

The City of Beech Grove is governed by an elected Mayor and a seven-man city council. The Mayor appoints various members of his administration, including the City Attorney, Chief of Police, the Chief of the Fire Department and other city employees. The City has its own separate police, fire, park and sanitation districts, street maintenance and other similar services.

The Town of Speedway is governed by an elected town board of trustees. The town board is empowered to control all other municipal departments and to appoint their administrators. These additional departments administer fire and police protection, sanitary services, street construction and maintenance, park facilities and water works for the citizens of the Town of Speedway.

The School City of Beech Grove is governed by a five-man board of school trustees, appointed by the common council of the City of Beech Grove. Likewise, the administration of the School Town of Speedway is vested in a three-man board of school trustees who are appointed by the Town board. The school trustees are statutorily vested with power to govern the school corporation, including the power to hold and own real estate in the name of the School City or Town. Both of these boards of school trustees in turn appoint a school superintendent with general day-to-day administrative duties and responsibilities.

Neither petitioners nor the communities they serve have ever been a part of IPS or the City of Indianapolis. Petitioners are, under Indiana law, separate corporations with the power to sue and be sued, to tax and issue bonds for school purposes, to acquire and hold title to real and personal property, and to generally administer their educational facilities and programs independently from the municipalities in which they are located. Ind. Code §§ 20-5-1-1 through 20-5-12-1 (Burns 1975 & Burns Supp. 1979).

What has come to be known as *Indianapolis I* began on May 31, 1968, when the United States of America filed suit under 42 U. S. C. § 2000c-6 against the Board of School Commissioners of the City of Indianapolis (IPS) and its Superintendent. On August 18, 1971, the district court found that IPS had operated a segregated school system. *U. S.* v. *Board of School Commissioners,* 332 F. Supp. 655 (S. D. Ind. 1971).

In its opinion the district court speculated that any plan of desegregation limited to IPS might not "work" because of a possible "exodus" of white families from the area served by IPS. The decision also focused in part on the "Consolidated First Class Cities and Counties Act", commonly known as "Uni-Gov." Indiana Acts 1969, Ch. 173, p. 357 (JA 154) (codified at Ind.Code §§ 18-4-1-1 through 18-4-15-2a (Burns 1974 & Burns Supp. 1979)). That legislation was passed in order to consolidate certain governmental functions theretofore performed by the City of Indianapolis and Marion County. The boundaries of the new City of Indianapolis were generally extended by Uni-Gov to the boundaries of Marion County, with certain exceptions. Those exceptions included the City of Beech Grove and the Town of Speedway which were defined under Uni-Gov as "excluded cities" and were thus unaffected by Uni-Gov in their status as separate municipal corporations. 332 F. Supp. at 676 n. 93; Ind. Code §§ 18-4-1-2(d) and (f) (Burns 1974).

In addition, the Uni-Gov legislation made no change in the jurisdiction, boundaries, territories served or operations of petitioners or any other school corporation in Marion County. As stated by the district court:

> "The Uni-Gov Act provides expressly that 'any school corporation, all or a part of the territory of which is in the consolidated city or county' shall not be affected by the Act. Thus, Uni-Gov leaves the defendant School City (IPS) exactly where it found it: confined to an area in the central part of the consolidated City of Indianapolis, where it is surrounded by eight township school systems operating in-

> dependently within the purportedly unified City, and by two additional independent school corporations operated by Beech Grove and Speedway City. . . ." 332 F. Supp. at 676.

Despite the fact that Uni-Gov made no alteration in the Marion County Schools, the trial court was critical of its effect. The court assumed that it was required to fashion a decree which would provide a "stable" racial balance or mix within IPS. This end, the court reasoned, could not be accomplished unless the court could require not only all Marion County schools but also schools outside of the county to participate in a multi-district remedy.

> "Realistically, it is clear that the tipping point/resegregation problem would pale into insignificance if the Board's (IPS) jurisdiction were coterminous with that of Uni-Gov. It would be minimized still further if extended to Lawrence, Beech Grove and Speedway City, and to certain parts of the adjoining counties practically indistinguishable from the City of Indianapolis, such as the Carmel area of Hamilton County and the Greenwood area of Johnson County." *Id.* at 679.

Plaintiff United States was ordered to file appropriate pleadings to secure the joinder of additional school corporations. Although the United States took steps to serve the additional defendants with summons, it failed to file complaints against them.

Because of the refusal of the United States to follow the court's instruction, the plaintiffs Buckley were allowed to intervene. Eventually, appellants and eighteen other school corporations within and without Marion County, and certain state officials, were added as defendants to answer to the allegations of intervenors' complaint. That complaint alleged that petitioners and the other defendants had committed discriminatory and segregatory acts and that Uni-Gov, as "further implemented" by Indiana Acts 1961, Ch. 186 (JA 138), and Indiana Acts

1969, Ch. 52 (JA 151), was unconstitutional. *Indianapolis II*, as the courts below styled it, had begun.

Following a lengthy trial, the district court held on July 20, 1973 that: (1) desegregation of IPS on 60% white—40% black ratio could be achieved; (2) but the ratio would not be "stable" and IPS would have a black majority within two or three years; (3) the State officials-defendants were responsible for the segregatory acts of IPS and those acts were "imputed" to the State; and (4) appellants and the other added defendants school corporations had not committed any acts of discrimination or segregation. *U. S.* v. *Board of School Commissioners*, 368 F. Supp. 1191 (S. D. Ind. 1973) To "cure" the State's Constitutional violations the trial court, with certain exceptions, ordered IPS to transfer a designated percentage of black students to the added defendants' schools. *Id.* at 1209.

On December 6, 1973, the district court issued its Supplemental Memorandum of Decision, *id.* at 1223-32, primarily directed to the Indiana State Legislature and containing "guidelines" as to legislation which the court requested the Indiana State Legislature to enact in order to form a metropolitan school system for students in Marion County and the adjoining counties. At the conclusion of such Memorandum (referred to by the courts below as *"Indianapolis III"*), the district court vacated its pupil transfer orders but continued in effect other orders requiring "in service training courses" for faculties and staff. *Id.* at 1231. The district court, however, certified the pupil transfer orders and conclusions of law contained in *Indianapolis II* for appeal as provided in 28 U. S. C. § 1292(b). 368 F. Supp. at 1231.

The trial court's decision in *Indianapolis II* was appealed to the United States Court of Appeals for the Seventh Circuit. *U. S.* v. *Board of School Commissioners*, 503 F. 2d 68 (7th Cir. 1974). In its opinion dated August 21, 1974, that Court:

> (1) affirmed the trial court's findings against the "State" and the State officials-defendants;

(2) reversed the trial court's findings and orders "insofar as they pertain to a metropolitan remedy beyond the Uni-Gov boundaries"; and

(3) vacated the trial court's ruling and orders "insofar as they pertain to a remedy within the boundaries of Uni-Gov", and remanded the case to the district court "for further proceedings consistent with" the decision in *Milliken* v. *Bradley*, 418 U. S. 717 (1974). The trial court was directed to "determine whether the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with Milliken". 503 F. 2d at 86.

Following the remand, another trial ensued in the district court. *U. S.* v. *Board of School Commissioners*, 419 F. Supp. 180 (S. D. Ind. 1975) (SA 36). In its decision of August 1, 1975, the trial court made a number of sweeping, generalized conclusions, most of which went well beyond the scope of the remand order. The trial court found that certain public housing projects had been located entirely within the boundaries of IPS, that the residents of such projects were 95% black, and therefore the location of such projects "obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory." *Id.* at 182 (SA at 39).

With respect to the Uni-Gov legislation—the only issue properly before the trial court under the remand order—the district court stated:

"The evidence clearly shows that at the time of the passage of the Uni-Gov Act in 1969, various annexation plans and school consolidation plans had bogged down on the local level because of the aforementioned opposition of the suburban school corporations within Marion County, and their patrons. However, the General Assembly of Indiana, with its members elected on a state-wide basis, was not, or should not have been, subservient to local pressures, and undoubtedly could have legislated a county-

> wide school system for Marion County as easily as it legislated a county-wide civil government. Under existing law, both Federal as expressed in Brown v. Board of Education . . . and in Green v. County School Board . . . and the law of Indiana as expressed in Acts 1949, Ch. 186, p. 603, Burns Ind. Stat. Ann. §§ 28-6106-28-6112 (1970),[4] it had a duty to alleviate the segregated condition then existing in IPS. When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with[in] IPS.
>
> The Court finds that the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries, given all of the other facts and circumstances set out in this and former opinions of this Court, warrants a limited inter-district remedy within all of Marion County, Indiana, as hereafter described." 419 F. Supp. at 183 (SA at 40-41) (citations omitted).

Thus, the trial court found that Uni-Gov "inhibited desegregation with[in] IPS". There was no finding that Uni-Gov *caused* inter-district segregation. Nevertheless, the trial court relied upon Uni-Gov's failure to reestablish school boundaries as a predicate for a "limited inter-district remedy within all of Marion County, Indiana. . . ."

The trial court entered orders and a judgment which required black students from IPS to be transferred to appellants and each of the other school corporations in Marion County except the Metropolitan School Districts of Pike and Washington Townships. The Pike and Washington Township schools were ex-

4. These sections were repealed by Indiana Acts 1973, P. L. 218, § 4. For the present law see Ind. Code §§ 20-8.1-2-1 through 20-8.1-2-7 (Burns 1975). The sections referred to by the court generally prohibit segregation in schools and school districts. However, nothing therein created a "duty" on the part of the Indiana General Assembly to do away with all other school corporations in Marion County because of the segregatory condition which existed in IPS. Nor, of course, did either of the cases cited by the district court create any such duty.

cluded from the inter-district order because the trial court determined that they possessed the proper racial mix. Black students were to be transferred in such numbers as to cause the total black enrollment of pupils in each of the transferee school corporations, after the transfers had been accomplished, to be approximately 15% black. Such transfer order was stayed by the United States Court of Appeals for the Seventh Circuit.

On July 16, 1976, the United States Court of Appeals for the Seventh Circuit affirmed the trial court by a two to one decision. *U. S.* v. *Board of School Commissioners,* 541 F. 2d 1211 (7th Cir. 1976) (SA 1). Circuit Judge Tone dissented. *Id.* at 1224 (SA at 26). The majority opinion narrowly stated the issues upon which it based its affirmance:

> "The district court . . . found two violations of the Equal Protection Clause upon which it based the interdistrict remedies that are at issue on this appeal. The first was the failure of the state to extend the boundaries of the Indianapolis Public School District (IPS) when the municipal government of Indianapolis and other governmental units in Marion County, Indiana, were replaced by a consolidated county-wide government called Uni-Gov. The second violation was the confinement of all public housing projects (in which 98 percent of the residents are black) to areas within the boundaries of the City of Indianapolis." *Id.* at 1212, (SA at 2) (citation omitted).

In its discussion of these issues the Court of Appeals stated that school reorganization took place in Marion County pursuant to the 1959 Indiana School Reorganization Act, Indiana Acts 1959, Ch. 202, as amended by Indiana Acts 1961, Chs. 231 and 302 (SA 63) (current version at Ind. Code §§ 20-4-1-1 through 20-4-1-40 (Burns 1975 & Burns Supp. 1979)). Consolidation of Marion County schools was generally opposed and in 1962 a plan was adopted which "did not significantly change boundaries in Marion County." 541 F. 2d at 1218 (SA at 14). The Seventh Circuit specifically noted that there was no evidence that such "opposition was racially motivated". *Id.* at 1217 & n. 6 (SA at 13 & n. 6).

Although its reasoning is unclear, the Circuit Court's rationale of affirmance may be summarized as follows:

1. School boundaries in Marion County were left unchanged after reorganization in 1962.

2. Annexation laws in existence prior to 1969 provided that IPS boundaries would expand with Indianapolis civil annexation, subject to remonstrance and subject to exclusion agreements between the schools involved.

3. Prior to 1969 civil annexations by Indianapolis were "illusory" and "frustrated by remonstrance litigation." In practice the boundaries of IPS were thus not expanded by civil annexations.

4. The elimination of these "illusory" annexation powers together with the failure of Uni-Gov to eliminate petitioners and the other school corporations in Marion County by expanding the boundaries of IPS to Marion County limits somehow resulted in a violation of the Equal Protection Clause.

With respect to public housing, the majority opinion did not base its affirmance of the interdistrict student transportation remedy upon this issue. Apparently, both the majority and dissenting opinions treated the public housing issue only as it pertained to the propriety of the trial court's order forbidding the location of further housing projects within IPS and enjoining the renovating of certain facilities. There is, however, language in the majority opinion which renders its reading ambiguous in this regard.

On January 25, 1977 the United States Supreme Court summarily vacated the judgment of the Court of Appeals, 429 U. S. 1068 (1977), and remanded the case to the Seventh Circuit for further consideration in light of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977), and *Washington* v. *Davis*, 426 U. S. 229 (1976).

On remand, *U. S.* v. *Board of School Commissioners*, 573 F. 2d 400 (7th Cir. 1978) (JA 54), the Seventh Circuit reviewed the issues and repeated much of what it had said before pertaining to Indiana "school history" and annexation. The Court then stated:

> "In what way did the State's choice of retaining the old IPS boundary in lieu of expanding it with the City boundary have a segregative impact? It did so, we think, in curtailing the power of IPS to remedy its own violation. Had IPS expanded with the City, it could have accomplished desegregation by spreading its black population throughout a larger area, much as the district court ordered." *Id.* at 407 (JA at 64-65).

With respect to the Uni-Gov issue, the Court of Appeals then concluded:

> "In light of the above, we hold that the passage of Uni-Gov and its companion legislation meets the requirements of *Milliken* and therefore can be used as a basis for imposing an interdistrict remedy if the district court finds that the General Assembly, in enacting the series of legislation, acted with a discriminatory intent or purpose." *Id.* at 408 (JA at 65).

The Court then stated that if residential segregation resulted from racially motivated housing practices in which the state participated and which caused school segregation, such practices could provide a foundation for a school desegregation order. *Id.* at 408-09 (JA at 67-68). With Chief Judge Fairchild concurring in a separate opinion, and Judge Tone dissenting, the case was remanded to the district court for further findings with respect to the issue of discriminatory intent.

After remand, the district court, on April 7, 1978, determined that the existing record was sufficient for purposes of making the findings required by the order of remand and that no further evidentiary hearings were required. On July 11, 1978, the district court found that the action of the Indiana General Assembly in enacting Uni-Gov without expanding the

boundaries of IPS to the county limits was done, at least in part, with racially discriminatory intent. *U. S.* v. *Board of School Commissioners,* 456 F. Supp. 183, 188 (S. D. Ind. 1978) (JA 84, 92). As to public housing, the district court found that the actions of the Housing Authority of the City of Indianapolis and the Metropolitan Development Commission of Marion County in locating public housing projects within the boundaries of IPS were racially motivated. *Id.* at 189 (JA at 93-94). The district court reinstated its previous judgment of August 1, 1975.

Appeals to the Seventh Circuit were taken and, on August 11, 1978, the Court of Appeals granted the motion of respondent IPS for remand to the district court for consideration of alternative remedy proposals. Those issues were tried in the district court in November, 1978 and on April 24, 1979 the district court filed its Memorandum of Decision. *U. S.* v. *Board of School Commissioners,* IP 68-C-225 (S. D. Ind. April 24, 1979) (JA 101). It found that the student transfer plan implementing the previous judgments of July 11, 1978 was the only one designed to remedy the effects of the discriminatory acts that the trial court had found. *Id.* (JA at 104-05). On July 9, 1979, the district court again entered judgments requiring the busing of black pupils from IPS to eight other school corporations within Marion County. *Id.* (JA at 130).

Appeals were taken from the district court's judgments and on April 29, 1980, the Seventh Circuit, with Circuit Judge Tone dissenting, affirmed the district court's judgment except for the judgments pertaining to petitioners. *U.S.* v. *Board of School Commissioners,* No. 78-1800 (7th Cir. April 29, 1980) (JA 1). The Court of Appeals found that Uni-Gov and its "companion legislation" were enacted with discriminatory purpose, *id.* slip op. at 10-11 (JA at 10-11), and that the location of public housing projects within IPS boundaries was also racially motivated. *Id.* slip op. at 16 (JA at 16). As to the latter issue, the Court discussed the contentions of suburban school corpora-

tions that public housing could not have been built outside the limits of IPS because of the absence of "cooperation agreements" which were necessary in order to obtain federal funds for the housing projects. The Court stated that the district court had found the cooperation agreement requirement irrelevant because the only such cooperation agreement which was needed under applicable statutes was an agreement with the City of Indianapolis as it was constituted prior to Uni-Gov. *Id.* slip op. at 15 (JA at 15). The Court of Appeals found that the absence of cooperation agreements was in fact irrelevant but for a different reason. The Court stated that the evidence showed that there were "no serious attempts" by the Indianapolis Housing Authority to obtain cooperation agreements, and that the only reason sites outside of IPS were not considered was because the responsible agencies were pursuing a deliberate policy of racial segregation. *Id.* slip op. at 16 (JA 15-16). The Court then concluded:

> "On these facts, then, it makes no difference whether or not additional cooperation agreements may have been required. It was HACI's own decision to limit the projects to IPS—that decision was not forced on it by the refusal of some other governing body to enter into a cooperation agreement." *Id.*

The Seventh Circuit discussed unique issues which pertained to these petitioners. It was noted that under the Uni-Gov Act the Town of Speedway and the City of Beech Grove were "excluded cities" and were not technically a part of the "new" City of Indianapolis. *Id.* slip op. at 24 (JA at 24). The Court also noted that Indiana law prior to Uni-Gov would not have permitted IPS to have expanded by civil annexation into Speedway and Beech Grove. *Id.* The Court then stated:

> "We think the issue is not quite as simple as Speedway and Beech Grove present it. As they present the argument, unilateral civil annexation of Speedway and Beech Grove by Indianapolis was prohibited by Indiana law. Therefore, the City of Indianapolis could not expand into their com-

> munities. Therefore, even if it was state policy to allow school boundaries to expand with civil boundaries, the barrier to unilateral civil annexation would have prevented IPS from ever expanding into their community.
>
> But despite all the barriers to annexation established generally by Indiana law prior to Uni-Gov, the Uni-Gov legislation did allow the City of Indianapolis to expand to the borders of Marion County. And specifically, Speedway and Beech Grove, despite their protective status under pre-Uni-Gov annexation law and despite their categorization 'as excluded cities' under Uni-Gov, nonetheless became subject to the authority of the Uni-Gov government for many purposes.
>
> The question then is, not whether Indiana law prior to Uni-Gov would have permitted the expansion of IPS into Speedway and Beech Grove but rather whether, if the Uni-Gov legislation had not generally excluded schools, it would have nonetheless excluded the schools of Speedway and Beech Grove." *Id.* slip op. at 24-25 (JA at 25).

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Judge Tone, in his dissenting opinion, once again thoroughly reviewed the record. He found no basis for a finding of invidious purpose with respect to either the Uni-Gov or housing issues and concluded with the following succinct analysis:

> "If I am right in my belief that the record does not support the findings of discriminatory purpose, the real issue raised by this case is whether otherwise permissible state action

that does not attempt to remedy the effect of *de facto* segregation is for that reason alone an act of *de jure* segregation. The lesson to be derived from today's decision seems to be that the answer is yes, and that a state's attempt to solve a governmental or social problem will be constitutionally permissible only if the state adopts the solution that will maximize desegregation of schools that are *de facto* segregated. Indiana, had it chosen to leave Marion County's civil government in its chaotic state, instead of adopting Uni-Gov, would have had no affirmative obligation to reorganize the schools or to transfer students across district lines. Similarly, had Indiana failed to provide a Housing Authority, or had it confined the Authority's jurisdiction to Indianapolis, the constitution would not have been violated. Instead, Indiana acted to improve municipal government and to provide decent housing for persons of limited means in a manner that would promote integration in housing. Because Indiana did not include in its governmental-structure and housing reforms a program of affirmative action with respect to *de facto* school segregation, which if included would have made the reforms themselves impossible to carry out, Indiana has been found to have intended a school segregation it did not create." *Id.* slip op, at 53 (JA at 51-52).

REASONS FOR ALLOWANCE OF THE WRIT.

A. Introduction.

Indisputably the length and complexity of this litigation stems from a fruitless search to find a predicate for an interdistrict remedy. A review of the decisions of the district court and the majority opinions of the United States Court of Appeals for the Seventh Circuit presents a perplexing pyramiding of shifting theories relating to "tipping points", 'white flight", Indiana school boundaries, annexation and public housing. Reduced to its essentials, however, this case clearly presents three important issues of federal law relating to school desegregation cases: (1) whether the location of public housing can

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In addition, the finding that public housing siting resulted in a constitutional violation was clearly erroneous in several respects. The following will summarize some of the cogent arguments supporting this conclusion:

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(e) The courts' conclusions regarding HACI and its projects totally ignore the vast amount of private, subsidized and public housing available throughout Marion County outside of IPS. The effect of any public housing project constructed by HACI cannot be viewed standing alone but must be considered along with all other housing evidence. That evidence clearly shows the availability of housing for low income black families outside of IPS. The evidence in this case also shows that substantial numbers of blacks live outside IPS boundaries and in the suburban areas served by Marion County school corporations other than IPS. The conclusion reached by the courts below that HACI's public housing projects somehow caused an interdistrict violation is thus totally fallacious.

C. Uni-Gov.

Milliken v. *Bradley*, 418 U. S. 717, 745 (1974), held that an inter-district remedy could be imposed only if it could be "shown that there has been a constitutional violation within one district that produces a signficant segregative effect in another district." If the discriminatory act of one district caused segregation in an adjacent district, or if "district lines had been deliberately drawn on the basis of race," then an inter-district remedy would be appropriate. *Id.*

No school corporation involved in this case, other than IPS, has been found to have committed any segregatory act. Petitioners and the other school corporations, except IPS, have expressly been found not to have committed *de jure* acts of segregation. *U. S.* v. *Board of School Commissioners*, 368 F.

(2) reversed the trial court's findings and orders "insofar as they pertain to a metropolitan remedy beyond the Uni-Gov boundaries"; and

(3) vacated the trial court's ruling and orders "insofar as they pertain to a remedy within the boundaries of Uni-Gov", and remanded the case to the district court "for further proceedings consistent with" the decision in *Milliken* v. *Bradley*, 418 U. S. 717 (1974). The trial court was directed to "determine whether the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with Milliken". 503 F. 2d at 86.

Following the remand, another trial ensued in the district court. *U. S.* v. *Board of School Commissioners*, 419 F. Supp. 180 (S. D. Ind. 1975) (SA 36). In its decision of August 1, 1975, the trial court made a number of sweeping, generalized conclusions, most of which went well beyond the scope of the remand order. The trial court found that certain public housing projects had been located entirely within the boundaries of IPS, that the residents of such projects were 95% black, and therefore the location of such projects "obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory." *Id.* at 182 (SA at 39).

With respect to the Uni-Gov legislation—the only issue properly before the trial court under the remand order—the district court stated:

"The evidence clearly shows that at the time of the passage of the Uni-Gov Act in 1969, various annexation plans and school consolidation plans had bogged down on the local level because of the aforementioned opposition of the suburban school corporations within Marion County, and their patrons. However, the General Assembly of Indiana, with its members elected on a state-wide basis, was not, or should not have been, subservient to local pressures, and undoubtedly could have legislated a county-

> wide school system for Marion County as easily as it legislated a county-wide civil government. Under existing law, both Federal as expressed in Brown v. Board of Education . . . and in Green v. County School Board . . . and the law of Indiana as expressed in Acts 1949, Ch. 186, p. 603, Burns Ind. Stat. Ann. §§ 28-6106-28-6112 (1970),[4] it had a duty to alleviate the segregated condition then existing in IPS. When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with[in] IPS.
>
> The Court finds that the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries, given all of the other facts and circumstances set out in this and former opinions of this Court, warrants a limited inter-district remedy within all of Marion County, Indiana, as hereafter described." 419 F. Supp. at 183 (SA at 40-41) (citations omitted).

Thus, the trial court found that Uni-Gov "inhibited desegregation with[in] IPS". There was no finding that Uni-Gov *caused* inter-district segregation. Nevertheless, the trial court relied upon Uni-Gov's failure to reestablish school boundaries as a predicate for a "limited inter-district remedy within all of Marion County, Indiana. . . ."

The trial court entered orders and a judgment which required black students from IPS to be transferred to appellants and each of the other school corporations in Marion County except the Metropolitan School Districts of Pike and Washington Townships. The Pike and Washington Township schools were ex-

4. These sections were repealed by Indiana Acts 1973, P. L. 218, § 4. For the present law see Ind. Code §§ 20-8.1-2-1 through 20-8.1-2-7 (Burns 1975). The sections referred to by the court generally prohibit segregation in schools and school districts. However, nothing therein created a "duty" on the part of the Indiana General Assembly to do away with all other school corporations in Marion County because of the segregatory condition which existed in IPS. Nor, of course, did either of the cases cited by the district court create any such duty.

cluded from the inter-district order because the trial court determined that they possessed the proper racial mix. Black students were to be transferred in such numbers as to cause the total black enrollment of pupils in each of the transferee school corporations, after the transfers had been accomplished, to be approximately 15% black. Such transfer order was stayed by the United States Court of Appeals for the Seventh Circuit.

On July 16, 1976, the United States Court of Appeals for the Seventh Circuit affirmed the trial court by a two to one decision. *U. S.* v. *Board of School Commissioners,* 541 F. 2d 1211 (7th Cir. 1976) (SA 1). Circuit Judge Tone dissented. *Id.* at 1224 (SA at 26). The majority opinion narrowly stated the issues upon which it based its affirmance:

> "The district court . . . found two violations of the Equal Protection Clause upon which it based the interdistrict remedies that are at issue on this appeal. The first was the failure of the state to extend the boundaries of the Indianapolis Public School District (IPS) when the municipal government of Indianapolis and other governmental units in Marion County, Indiana, were replaced by a consolidated county-wide government called Uni-Gov. The second violation was the confinement of all public housing projects (in which 98 percent of the residents are black) to areas within the boundaries of the City of Indianapolis." *Id.* at 1212, (SA at 2) (citation omitted).

In its discussion of these issues the Court of Appeals stated that school reorganization took place in Marion County pursuant to the 1959 Indiana School Reorganization Act, Indiana Acts 1959, Ch. 202, as amended by Indiana Acts 1961, Chs. 231 and 302 (SA 63) (current version at Ind. Code §§ 20-4-1-1 through 20-4-1-40 (Burns 1975 & Burns Supp. 1979)). Consolidation of Marion County schools was generally opposed and in 1962 a plan was adopted which "did not significantly change boundaries in Marion County." 541 F. 2d at 1218 (SA at 14). The Seventh Circuit specifically noted that there was no evidence that such "opposition was racially motivated". *Id.* at 1217 & n. 6 (SA at 13 & n. 6).

Although its reasoning is unclear, the Circuit Court's rationale of affirmance may be summarized as follows:

1. School boundaries in Marion County were left unchanged after reorganization in 1962.

2. Annexation laws in existence prior to 1969 provided that IPS boundaries would expand with Indianapolis civil annexation, subject to remonstrance and subject to exclusion agreements between the schools involved.

3. Prior to 1969 civil annexations by Indianapolis were "illusory" and "frustrated by remonstrance litigation." In practice the boundaries of IPS were thus not expanded by civil annexations.

4. The elimination of these "illusory" annexation powers together with the failure of Uni-Gov to eliminate petitioners and the other school corporations in Marion County by expanding the boundaries of IPS to Marion County limits somehow resulted in a violation of the Equal Protection Clause.

With respect to public housing, the majority opinion did not base its affirmance of the interdistrict student transportation remedy upon this issue. Apparently, both the majority and dissenting opinions treated the public housing issue only as it pertained to the propriety of the trial court's order forbidding the location of further housing projects within IPS and enjoining the renovating of certain facilities. There is, however, language in the majority opinion which renders its reading ambiguous in this regard.

On January 25, 1977 the United States Supreme Court summarily vacated the judgment of the Court of Appeals, 429 U. S. 1068 (1977), and remanded the case to the Seventh Circuit for further consideration in light of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977), and *Washington* v. *Davis*, 426 U. S. 229 (1976).

On remand, *U. S.* v. *Board of School Commissioners,* 573 F. 2d 400 (7th Cir. 1978) (JA 54), the Seventh Circuit reviewed the issues and repeated much of what it had said before pertaining to Indiana "school history" and annexation. The Court then stated:

> "In what way did the State's choice of retaining the old IPS boundary in lieu of expanding it with the City boundary have a segregative impact? It did so, we think, in curtailing the power of IPS to remedy its own violation. Had IPS expanded with the City, it could have accomplished desegregation by spreading its black population throughout a larger area, much as the district court ordered." *Id.* at 407 (JA at 64-65).

With respect to the Uni-Gov issue, the Court of Appeals then concluded:

> "In light of the above, we hold that the passage of Uni-Gov and its companion legislation meets the requirements of *Milliken* and therefore can be used as a basis for imposing an interdistrict remedy if the district court finds that the General Assembly, in enacting the series of legislation, acted with a discriminatory intent or purpose." *Id.* at 408 (JA at 65).

The Court then stated that if residential segregation resulted from racially motivated housing practices in which the state participated and which caused school segregation, such practices could provide a foundation for a school desegregation order. *Id.* at 408-09 (JA at 67-68). With Chief Judge Fairchild concurring in a separate opinion, and Judge Tone dissenting, the case was remanded to the district court for further findings with respect to the issue of discriminatory intent.

After remand, the district court, on April 7, 1978, determined that the existing record was sufficient for purposes of making the findings required by the order of remand and that no further evidentiary hearings were required. On July 11, 1978, the district court found that the action of the Indiana General Assembly in enacting Uni-Gov without expanding the

boundaries of IPS to the county limits was done, at least in part, with racially discriminatory intent. *U. S.* v. *Board of School Commissioners,* 456 F. Supp. 183, 188 (S. D. Ind. 1978) (JA 84, 92). As to public housing, the district court found that the actions of the Housing Authority of the City of Indianapolis and the Metropolitan Development Commission of Marion County in locating public housing projects within the boundaries of IPS were racially motivated. *Id.* at 189 (JA at 93-94). The district court reinstated its previous judgment of August 1, 1975.

Appeals to the Seventh Circuit were taken and, on August 11, 1978, the Court of Appeals granted the motion of respondent IPS for remand to the district court for consideration of alternative remedy proposals. Those issues were tried in the district court in November, 1978 and on April 24, 1979 the district court filed its Memorandum of Decision. *U. S.* v. *Board of School Commissioners,* IP 68-C-225 (S. D. Ind. April 24, 1979) (JA 101). It found that the student transfer plan implementing the previous judgments of July 11, 1978 was the only one designed to remedy the effects of the discriminatory acts that the trial court had found. *Id.* (JA at 104-05). On July 9, 1979, the district court again entered judgments requiring the busing of black pupils from IPS to eight other school corporations within Marion County. *Id.* (JA at 130).

Appeals were taken from the district court's judgments and on April 29, 1980, the Seventh Circuit, with Circuit Judge Tone dissenting, affirmed the district court's judgment except for the judgments pertaining to petitioners. *U.S.* v. *Board of School Commissioners,* No. 78-1800 (7th Cir. April 29, 1980) (JA 1). The Court of Appeals found that Uni-Gov and its "companion legislation" were enacted with discriminatory purpose, *id.* slip op. at 10-11 (JA at 10-11), and that the location of public housing projects within IPS boundaries was also racially motivated. *Id.* slip op. at 16 (JA at 16). As to the latter issue, the Court discussed the contentions of suburban school corpora-

tions that public housing could not have been built outside the limits of IPS because of the absence of "cooperation agreements" which were necessary in order to obtain federal funds for the housing projects. The Court stated that the district court had found the cooperation agreement requirement irrelevant because the only such cooperation agreement which was needed under applicable statutes was an agreement with the City of Indianapolis as it was constituted prior to Uni-Gov. *Id.* slip op. at 15 (JA at 15). The Court of Appeals found that the absence of cooperation agreements was in fact irrelevant but for a different reason. The Court stated that the evidence showed that there were "no serious attempts" by the Indianapolis Housing Authority to obtain cooperation agreements, and that the only reason sites outside of IPS were not considered was because the responsible agencies were pursuing a deliberate policy of racial segregation. *Id.* slip op. at 16 (JA 15-16). The Court then concluded:

> "On these facts, then, it makes no difference whether or not additional cooperation agreements may have been required. It was HACI's own decision to limit the projects to IPS—that decision was not forced on it by the refusal of some other governing body to enter into a cooperation agreement." *Id.*

The Seventh Circuit discussed unique issues which pertained to these petitioners. It was noted that under the Uni-Gov Act the Town of Speedway and the City of Beech Grove were "excluded cities" and were not technically a part of the "new" City of Indianapolis. *Id.* slip op. at 24 (JA at 24). The Court also noted that Indiana law prior to Uni-Gov would not have permitted IPS to have expanded by civil annexation into Speedway and Beech Grove. *Id.* The Court then stated:

> "We think the issue is not quite as simple as Speedway and Beech Grove present it. As they present the argument, unilateral civil annexation of Speedway and Beech Grove by Indianapolis was prohibited by Indiana law. Therefore, the City of Indianapolis could not expand into their com-

> munities. Therefore, even if it was state policy to allow school boundaries to expand with civil boundaries, the barrier to unilateral civil annexation would have prevented IPS from ever expanding into their community.
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> But despite all the barriers to annexation established generally by Indiana law prior to Uni-Gov, the Uni-Gov legislation did allow the City of Indianapolis to expand to the borders of Marion County. And specifically, Speedway and Beech Grove, despite their protective status under pre-Uni-Gov annexation law and despite their categorization 'as excluded cities' under Uni-Gov, nonetheless became subject to the authority of the Uni-Gov government for many purposes.
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C. Uni-Gov.

Milliken v. *Bradley,* 418 U. S. 717, 745 (1974), held that an inter-district remedy could be imposed only if it could be "shown that there has been a constitutional violation within one district that produces a signficant segregative effect in another district." If the discriminatory act of one district caused segregation in an adjacent district, or if "district lines had been deliberately drawn on the basis of race," then an inter-district remedy would be appropriate. *Id.*

No school corporation involved in this case, other than IPS, has been found to have committed any segregatory act. Petitioners and the other school corporations, except IPS, have expressly been found not to have committed *de jure* acts of segregation. *U. S.* v. *Board of School Commissioners,* 368 F.

Supp. 1191, 1203 (S. D. Ind. 1973) (*Indianapolis II*). School boundaries in Marion County, Indiana, have largely been left unchanged for more than half a century. There is no contention or finding that the boundaries of the schools involved were discriminatorily established or maintained. Indiana school corporations are separate and distinct from civil government units. Uni-Gov did not alter school boundaries or school operations in any way. The racial composition of IPS and the segregation within IPS was not caused by the state legislation which the Court of Appeals found repugnant to the Equal Protection Clause. Both factually and legally then, Uni-Gov did not cause and could not have caused inter-district segregation as between IPS and the other school corporations involved in this action. As stated in *Milliken,* there has been no showing that "racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantial cause of inter-district segregation." 418 U. S. at 745.

In point of fact, Uni-Gov was not and never could have been a cause of the segregation in IPS which was found in *Indianapolis I. U. S.* v. *Board of School Commissioners,* 332 F. Supp. 655 (S. D. Ind. 1971). That action was filed on May 31, 1968. The segregation which the trial court found in *Indianapolis I* existed on that date. Uni-Gov did not become effective until January 1, 1970. Ind. Code § 18-4-15-2 (Burns 1974). Uni-Gov thus was not a causative factor as to the segregation which has underpinned this entire case.

Uni-Gov became an issue in this case only because the district court felt that it was required to fashion a decree which would provide a stable racial mix within IPS—one which would not be affected by "white flight". That end, the district court reasoned, could not be accomplished unles the court could require schools other than IPS to participate in a multi-district remedy. 332 F. Supp. at 676. Uni-Gov has never been viewed by the courts below as a *cause* of segregation in IPS. The lower courts' concept was that if Uni-Gov had consolidated all of the

schools within Uni-Gov, the geographical scope of the courts' remedial powers would have been widened.

Thus, in the instant case no record has been made that the racial composition of IPS was in any measure caused by Uni-Gov. In fact, a cogent argument can be made that Uni-Gov, with its extension of government services and regulation to the county lines, may have facilitated the movement of blacks into the suburbs. The decision of the Court of Appeals with respect to Uni-Gov is clearly erroneous.

D. Discriminatory Intent.

Since the issue of discriminatory intent has been adequately discussed in Judge Tone's dissenting opinion, *U. S.* v. *Board of School Commissioners,* No. 78-1800, slip. op. at 29 (7th Cir. April 29, 1980) (JA 28), petitioners wish to emphasize only one element of the pertinent analysis. The courts below found that the Indiana Legislature acted discriminatorily in passing Uni-Gov and its companion legislation. That finding, however, may be tested by asking whether the Indiana Legislature could have foreseen the events which have taken place in this case. The following summary indisputably shows it could not.

Uni-Gov and its "companion legislation" were enacted in 1969. This action was initiated by the United States against IPS on May 31, 1968. *U. S.* v. *Board of School Commissioners,* 332 F. Supp. 655 (S. D. Ind. 1971) *(Indianapolis I).* However, *Indianapolis I* was not decided until August 18, 1971. *Indianapolis I* found that only IPS was guilty of segregation. The district court in its opinion suggested, *two years after the enactment of Uni-Gov,* that a cross-district desegregation plan *might* be appropriate and ordered steps to be taken to bring in other school corporations. *Id.* at 678-681. The United States, as the original plaintiff, had never requested a cross-district remedy and such a remedy was never an issue until the August 18, 1971 decision of the district court. No decision ordering a cross-

district remedy was entered by the district court until July 20, 1973. *U. S.* v. *Board of School Commissioners,* 368 F. Supp. 1191 (S. D. Ind. 1973) (*Indianapolis II*).

Thus, in order for the Indiana Legislature to have enacted Uni-Gov and the other 1969 legislation with a racially discriminatory purpose or intent, it would have had to have foreseen or anticipated that the plaintiffs in this action would be victorious, that two years after Uni-Gov's enactment the district court would suggest for the first time the possible need for a cross-district remedy, and that the district judge would finally order such a remedy. Given the record in this case and the complexities and paucity of cross-district actions, the Indiana Legislature would have had to have been possessed of considerable prophetic prowess to have passed the subject legislation with the requisite discriminatory intent.

CONCLUSION.

The Court should grant the petition and determine the important issues of federal law presented by this case.

Respectfully submitted,

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